



The ‘Covid Class of 2020’: Changes to SEND legislation

This article forms part of a series on the impact of coronavirus in the education sector.

The coronavirus pandemic has caused a ‘lost generation’ of children and young people to fall through gaps in the education system. The effects of this will be particularly acute on those who were already vulnerable or required extra support for their needs before the pandemic hit.

It outlines the key changes to Special Educational Needs and Disability (SEND) legislation as a result of coronavirus.

Temporary changes to SEND legislation

[The Children and Families Act 2014](#) reformed the statutory regime for making provision for children and young people with SEND. Importantly, statements of special education needs were replaced with new EHC plans, which combine educational provision with healthcare. The 2014 Act and corresponding regulations require local authorities to, among other things, assess a child’s needs, provide an EHC plan and secure provisions identified where necessary.

At the end of April 2020, the government announced two significant temporary changes to this SEND framework. The changes affected the delivery of special educational and health provisions for children and young people in accordance with EHC Plans.

The first was a relaxation of s.42 duty on local authorities to secure provisions under EHC plans. The second is a change to timescale for EHC processes.

[Non-statutory guidance](#) was published on 30 April 2020, which local authorities are expected to follow.

Section 42 duty

S.42 places a duty on local authorities and health commissioning bodies to secure the provisions stipulated in an EHC Plan. This duty was relaxed such that local authorities were only required to use “reasonable endeavours” to secure the provision in an EHC Plan.

The Secretary of State for Education published a notice, effective from 1 May 2020, using emergency powers under the [Coronavirus Act 2020](#) to temporarily relax the duty under s.42 of the Children and Families Act 2014 until the end of the month (see para 5(1)(b) and 5(6) of Schedule 17). This was followed with two further notices, extending this period until the end of July.

The notice has not at this time been extended again, so the s.42 duty is now back in full force. But the Secretary of State announced on 2 July that he will consider whether such flexibilities may be required locally to respond to outbreaks.

Despite these modifications, local authorities continued to have duties under s.42 and must consider for each child and young person with an EHC plan what could reasonably be provided in the circumstances.

EHC plan timescales

The second major change to the statutory timescales for EHC assessments, plans and processes to be carried out. This was introduced through [the Special Educational Needs and Disability \(Coronavirus\) \(Amendment\) Regulations 2020](#), which amended existing regulations and came into force on 1 May 2020. The explanatory note to the regulations explain that the 2020 Regulations: “*make amendments to secondary legislation relating to special educational needs and disability in order to provide exceptions to time limits set out in that legislation where they cannot be met because of a reason relating to the incidence or transmission of coronavirus.*” By regulation 2(2), the amendment regulations will expire on 25 September 2020.

Technically, the timescales stipulated in the 2014 Regulations remain in place. But the Amendment Regulations introduce the ‘coronavirus exception’, permitting certain processes to be completed as soon as practicable, or as soon as reasonably practicable, where it has not been possible to carry them out within the normal time limit due to “*a reason relating to the incidence or transmission of coronavirus*”.

The Amendments, which are listed in [the Annex to the Government Guidance](#), include the 6-week limit for notifying a child’s parents whether an EHC needs assessment will take place, the 20-week limit for issuing EHC Plans, the 8-week limit for amending a plan following a review, and the 1 year review requirement. The Secretary of State has also been given the power to ‘pause’ local authorities’ duties to conduct annual reviews of EHC Plans (para 5 of schedule 17), but this has not yet been used.

Importantly, the 15-day period for parents to make representations on a draft EHC plan remains unchanged ([regulation 13 of the Special Educational Needs and Disability Regulations 2014](#)).

While this change gives local authorities more flexibility, they are still required to follow the statutory processes and consider requests for needs assessments and re-assessments. To rely upon the amendments, the local authorities' non-compliance must be related to COVID and it is expected that local authorities will not be able to rely on the fact of the pandemic alone in the event of a legal challenge.

Ongoing provisions

Importantly, while there have been some relaxations over this period, there has been no change to the substantive entitlements for children and young people with SEND. Key elements of the EHC process remain unchanged, including: the duty on local authorities to consider requests for new assessments, to secure all of the required advice and information to issue a plan, and have regard to the views of the child, parent or young person under s.19 of the 2014 Act. The provisions in the final plan must be in line with the statutory requirements of any EHC plan and are not to be limited because of covid-19.

Also, the local authority should continue to have regard to the guidance in para 9.43 of the [SEND code of practice: 0 to 25 years](#), relating to the handling of delays. This requires that local authorities should aim to keep delays to a minimum and keep the child's parents or young person informed of any exemptions causing delays.

Concerns and challenges

There is a real concern that these relaxations could be relied upon by stretched local authorities to justify reduced EHC provisions and delay important decisions that have an impact on children who already are often marginalised in the education system. This is of course a concern for children and young people with EHC plans, who are likely to feel the impact of disruption to learning during the pandemic acutely.

The relaxation of legal rights for people with SEND has been subject to a JR in the Administrative Court in [R \(Shaw and ABC\) v Secretary of State for Education \[2020\] EWHC 2216](#), challenging the enactment of the 2020 Regulations and the statutory notices modifying the s.42 duty. Kerr J considered evidence on the impact of the changes on children and young people with SEND and entertained but refused the grounds that there was a breach of the duty to consult and that the 2020 regulations were irrationally laid before Parliament the day before they came into force. The claimants are considering appeal.

We will be keeping a close eye on the impact of coronavirus on the educational provisions for children and young people with SEND, especially with the full return to school in September.

If you would like to speak to any of our members of the education team about back to school preparation, SEND provisions or any wider queries, please get in touch via the clerks at clerks@3sharecourt.com.

Written by [Natasha Jackson](#) at [3 Hare Court](#)